IN THE

Supreme Court of the United States

October Term, 1979

No. .....

In re:

MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION

THE FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

vs.

JOHN C. RISJORD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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vs.

JOHN C. RISJORD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner THE FIRESTONE TIRE & RUBBER COMPANY prays that a writ of certiorari issue to review the judgment *en banc* of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on January 7, 1980.

Opinions Below.

The "opinion" of United States District Judge William R. Colinson (Western District of Missouri) on Firestone's Motion to Disqualify Attorney John C. Risjord and the Risjord firm (being a portion of the Second Pretrial Order) is unreported and appears at

Appendix A.[1] The opinion of the Court of Appeals is as yet unreported and appears at Appendix B, together with the judgment as entered showing the date of entry.

Jurisdiction.

The judgment of the Court of Appeals is dated and was entered on January 7, 1980 (App. B, p. 11). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Is an order denying a motion to disqualify counsel a final decision in a collateral matter so as to qualify for appeal pursuant to 28 U.S.C. §1291 under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (a basic question on which the courts of appeal are sharply divided)? (See Point I, *infra*).

2. In sanctioning the simultaneous representation by attorney Risjord of both the plaintiffs and the insurer of defendant Firestone, over Firestone's objections, did the court below err by permitting a patent and potentially recurring form of conflict, requiring corrective action by the exercise of this Court's supervisory jurisdiction? (See Point II, *infra*).

Statute Involved.

United States Code, Title 28 §1291.

"*Final decisions of district courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of

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[1]The order in question was included as a discrete order in the United States District Court's Second Pretrial Order (R., p. 297).

the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Statement of the Case.

This proceeding involves a motion to disqualify counsel arising in the context of multi-district proceedings. Jurisdiction of the court of first instance (the United States District Court for the Western District of Missouri) in the multi-district proceedings ultimately rests on diversity grounds. 28 U.S.C. §1332(a).

John C. Risjord and the Risjord firm[2] are attorneys for certain plaintiffs (the Risjord Plaintiffs) who have sued Firestone, seeking damages for personal injuries[3] (R. pp. 324, 338, 351). Risjord and the Risjord firm also have a long-standing relationship as attorneys for The Home Insurance Company, which insures Firestone against the claims of the Risjord Plaintiffs (R. pp. 117, 136; 289-290). The Risjord-Home relationship extends over a period of some twenty years, during which Risjord and the Risjord firm have represented

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[2]In the present Petition, we shall refer to John C. Risjord, appellee below and respondent here, as "Risjord"; to Niewald, Risjord & Waldeck, the law firm of which he is a member, as the "Risjord firm"; to appellant The Firestone Tire & Rubber Company, appellant below and petitioner here, as "Firestone"; to The Home Insurance Company, Firestone's insurer and a client of Risjord and the Risjord firm, as "Home"; and to certain personal injury plaintiffs represented by Risjord and the Risjord firm in this multi-district litigation as the "Risjord Plaintiffs". Record references (designated "R., p. ....." or "Risjord Dep., p. .....") are to the Record in the Court of Appeals. Appendix references (designated "App. ....., p. .....") are to the appendices to this Petition.

[3]The suits of the Risjord Plaintiffs are part of multidistrict litigation involving a number of personal injury actions which have been brought against various manufacturers of multi-piece rims or components thereof, including Firestone.

Home in a number of matters[4] and consistently held Home out to the public[5] as their foremost insurance client (Risjord Dep., pp. 100-101, 119-120, Exh. 32; R. p. 64).

In framing his complaints against Firestone, Risjord included a highly unusual theory of "intentional tort", whereupon his client Home served "reservation of rights" letters upon Firestone, disclaiming coverage for such "intentional tort" claims under its liability policy (R. pp. 119, 121, 324, 338, 351).

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[4]In his deposition, Risjord at one point testified as follows:

"Q How long has your firm represented the Home Insurance Company?

"A The Home Insurance Company, my understanding, was a fire insurance company. We represented the Home Insurance Company—Fire Insurance Company—periodically, probably as long as I have practiced law." (Risjord Dep. p. 101).

[5]At the time of the trial court's order denying Firestone's motion to disqualify, Risjord and his firm were counsel of record for Home in one such case entitled *Cannova Enterprises, Inc., etc. v. Home Insurance Company, et al.*, pending in the Western District of Missouri (Risjord Dep. p. 118). Pending Firestone's appeal, Home purported to discharge Risjord in *Cannova* (R. p. 437). Since the Court of Appeals does not even mention that fact, let alone rely on it, we need not discuss it at length here. Risjord's purported divorcement from *Cannova* is by no means complete; Risjord remains as counsel for the other defendants in *Cannova*, in which role he is still in a position to serve Home's interests in that case (R. p. 437). Viewed in terms of an "appearance of impropriety", the "withdrawal" is more cosmetic than real. But even assuming, *arguendo*, that Risjord were totally divorced from *Cannova* (which is not the fact), that would not be a meaningful cure, since the relationship between Risjord and Home is deeply rooted and far transcends Risjord's involvement in *Cannova*. See *I.B.M. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978). Nor would Risjord be unaware that his firm's potential future business with its longstanding client, Home, might well depend on the extent his actions tended to aid or hinder Home's efforts (hereafter described) to defeat coverage on the claims of the Risjord Plaintiffs.

itself attests to its significance. Finally, the fact that the underlying disqualification issues are of basic concern to the administration of justice underscores the need for a consistent approach. While we believe the considerations favoring appealability to be the more persuasive, at the very least the question ought to be addressed and put to rest by this Court.

Third, we submit that in adopting a rule of non-appealability[11] the decision below not only runs counter to the letter and spirit of the *Cohen* doctrine (the prerequisites of which are satisfied by orders of the type in question) but also does violence to two cardinal policy concerns, both vital to public confidence in the administration of justice; the need for more (not less) emphasis upon the propriety of attorney conduct, and the need to achieve greater efficiency by "nipping in the bud" a potentially tainted proceeding. As aptly stated in the leading case of *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra,* 496 F.2d 800 at 805:

> ". . . Now in 1974 we believe that *Cohen* requires a return to the wisdom of *Harmar* [Drive-In Theatre v. Warner Bros. Pictures, 239 F.2d 555 (2d Cir., 1956)] and so we uphold the appealability of an order denying disqualification, just as we have long upheld the appealability of an order granting this. There is no sufficient basis for distinguishing between the two. In both situations the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief.

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[11]The court below states that orders *granting* motions to disqualify will continue to be treated as appealable collateral orders under *Cohen.*

> "It would seem to be appropriate at this time to dispel the needless uncertainty as to the law and procedure relating to the appealability of disqualification orders. All three prerequisites of *Cohen* are met. Since this is so, there is no reason not to follow the mandate of the Supreme Court and adopt their decision, namely:
>
> > We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.
>
> 337 U.S. at 547.
>
> By holding such an order directly appealable, we eliminate the uncertainties (and the paperwork) attendant to resorting to § 1292(b) and/or § 1651. Since the ultimate objective is to bring before an appellate court an important question which, if unresolved, might well taint a trial, why should not this question be presented before judicial and attorney time may have been needlessly expended?"

One further point should be noted. Having held that an order denying disqualification would no longer be regarded as appealable, the Court of Appeals nevertheless purported to address the merits of Firestone's appeal from the trial court's order refusing to disqualify attorney John Risjord. But given the court's *en banc* holding on the question of appealability, it was hardly surprising that the court's "consideration" of the merits was perfunctory and *pro forma*, consisting in essence of a single sentence,[12] with the court not even permit-

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[12]The Court of Appeals' entire "discussion" of the merits consists of the following: "In fairness to the appellant in the instant case, we hold the overruling of *Weber* and *Dean*

ting oral argument, let alone addressing in a meaningful way the facts and issues briefed by the parties. Indeed, having concluded that refusals to disqualify counsel no longer would be deemed worthy of appeal, the Court of Appeals hardly could have reversed the trial court in the case at bar, for to do so would have undermined the appellate court's position in declining to entertain such appeals in the future.

Moreover, having held that orders such as that appealed from were nonappealable, the court was effectively foreclosed by procedural considerations from devoting any real attention to the merits. To turn to the merits in a meaningful way would have suggested that what the court labeled as a holding on nonappealability was advisory only, not binding on the court, future litigants, or even the litigants before it. This, in turn, would have placed the court at odds with the Constitutional proscription against advisory opinions (see *Muskrat v. United States*, 219 U.S. 346 (1911)) and the related doctrine (grounded in the "case or controversy" requirement of Article III of the Constitution) that even a prospective ruling (in this case, a ruling of nonappealability) must apply to the litigants actually before the court. See, e.g., *Desist v. United States*, 394 U.S. 244, 254-255 note 24 (1969); *Stovall v. Denno*, 388 U.S. 293, 301 (1967). In short, Firestone has not really had its day in court on the merits.

Foods to be prospective only. Thus, we permit the instant appeal. Nevertheless, we have carefully reviewed the pleadings, and briefs, and have concluded that the district court did not abuse its discretion in refusing to disqualify counsel. Accordingly, the motion to dismiss is denied, the district court's denial of the motion to disqualify is affirmed, and the case is remanded to the district court for further proceedings." (App. B, p. 10).

II.

The Court Below Displayed an Insensitivity to a Basic but Potentially Recurring Form of Conflict Requiring the Exercise of This Court's Supervisory Jurisdiction.

The record below reflects (essentially without contradiction) that attorney John Risjord and his firm, who represent the plaintiffs in certain product liability (wheel and rim) cases against Firestone, also have a long-standing relationship as attorneys for Firestone's product liability insurer (The Home Insurance Company) which the Risjord firm holds out as its foremost insurance client (R. pp. 64, 117, 136, 285-290, Risjord Dep. pp. 100-101, 119-120, Exh. 32). Based on an "intentional tort" theory espoused by Risjord, Home disclaimed coverage under its policy. (R. pp. 119-121). Firestone, voicing concern that Risjord's management of the cases inevitably would be colored (consciously or unconsciously) by his awareness of Home's interest (as insurer of those very claims) in defeating coverage, moved to disqualify Risjord, noting that the conflict inherent in Risjord's position was detrimental both to Firestone and the plaintiffs to whom Risjord owed a duty of undivided loyalty.

The trial court, while finding that the resulting conflict was likely to adversely affect Risjord's exercise of his independent judgment (App. A, p. 4; R. p. 292), nevertheless held that Risjord might remain in the cases provided he obtained the consent of Home (which stood to benefit by the very conflict complained of) and the Risjord plaintiffs (who were hardly of sufficient sophistication to appreciate the conflict), irrespective of any objection interposed by Firestone. The Court of Appeals, without addressing the facts (essentially undis-

puted) in any meaningful detail, purported to uphold the trial court's action as a permissible exercise of discretion (App. B, p. 10).

We believe that this not only has resulted in a grave injustice to Firestone, but that it poses a question worthy of consideration by this Court.

The trial court itself took pains to endorse Firestone's appeal and the substantiality of the question it poses (App. A, p. 5; R. p. 292).

Beyond this, the disciplinary rule applied below (Disciplinary Rule ("DR") 5-105,[13] derived from the Code of Professional Responsibility of the American Bar Association ("ABA Code")), is in widespread use throughout the Federal judiciary as well as most of the States. 1 and 2 *Federal Local Court Rules* (Pike & Fischer, Inc., ed., Callaghan & Co. 1979), *passim*

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[13]DR5-105 (*i.e.*, the Missouri version (adopted in the Western District), which omitted some additional language found in the ABA Code) provides:

"(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

(hereinafter "Federal Local Rules");[14] *In re Griffiths*, 413 U.S. 717, 727 note 19 (1973) ("The ABA Code of Professional Responsibility has since [1970] been approved and adopted in the District of Columbia and in 46 States . . ."). Its proper application is therefore a matter of general importance. This is particularly true in the insurance context, where the Rule helps to obviate the everpresent danger (hereafter discussed) that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit.

In essence, DR5-105 precludes an attorney from accepting or continuing employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client," (except to the limited extent permitted under the consent provisions of DR5-105(C)). The Rule is in furtherance of the policy articulated in Canon 5 of the ABA Code, that "a lawyer should exercise independent professional judgment on behalf of a client", and the mandate of Canon 9 that "a lawyer should avoid even the appearance of professional impropriety".

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[14]See, *e.g.*, M.D. Ala., Local Rule of Court Concerning Oath of Attorneys Upon Their Admission to Practice (adopting Canons of the ABA and Code of Ethics of the Alabama State Bar Association), 1 *Federal Local Rules* at Ala., p. 2a; N.D. Ill., Local Rule 6(a)(i) (attorney for admission must certify that he has read the Canons of Ethics of the ABA and "will faithfully adhere thereto"; Local Rule 8(3) (discipline of attorneys who fail "to abide by the provisions of the Canons of Ethics of the American Bar Association"), 1 *Federal Local Rules* at Ill. pp. 54-55.

Even districts which do not adopt the Code directly may do so indirectly by requiring attorneys practicing before them to be members of a state bar which has adopted the Code. See, *e.g.*, N.D. Ala., Local Rule 7, *Federal Local Rules*, at Ala., p. 6.

In view of the vital need to preserve and strengthen public confidence in the Bar, any construction of the Rule which threatens to undermine its underlying purposes must be viewed as cause for concern. At the very least, given the need to resolve the basic procedural conflict discussed at Point I, the merits of the substantive controversy are worthy of ancillary consideration, and particularly so inasmuch as the basic facts are essentially undisputed and the trial court itself found a likelihood that the exercise of Risjord's independent professional judgment would be adversely affected by his dual representations. Insofar as the courts below failed to address the full implications of that finding or to take meaningful corrective action, the task remaining is one which this Court readily can and ought to assume.

The basic fallacy in the approach of the lower courts stems from a misapplication of a carefully drawn exception to the general doctrine of DR5-105, whereby informed consent by all affected interests may obviate a conflict where it is "obvious" that the challenged attorney can adequately represent the various interests involved and all affected interests join in the consent. DR5-105(C). This "consent" provision plainly is not designed to sanction situations involving "such delicate conflicting relationships and inescapable divided loyalties" as are here present. As noted in *Matter of Kelly v. Greason*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968) (from which the quoted phrases are taken), in such cases "the likelihood alone of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct. Where divided loyalties exist, a lawyer may inadvertently, and despite the best of motives, be influenced and act detrimentally

to the client, or the appearance of misconduct will be unavoidable [citing cases]. Moreover, the unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him (*Matter of Young,* 188 App.Div. 538, 542-544, 177 N.Y.S. 259, 261-63)."

Nor could any viable "consent" approach be taken in any event without providing for the consent of *all* affected parties, including Firestone. Pertinent here is the following observation in *Cinema 5, Ltd. v. Cinerama, Inc.,* 528 F.2d 1384 (2d Cir. 1976): "*Putting it as mildly as we can,* we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge *and* consent of *all* concerned." (Emphasis added). 528 F.2d 1384, 1386 (2d Cir. 1976). Even assuming, *arguendo,* that Home and the individual plaintiffs consented, Firestone has *not* consented. Therefore, Risjord has not secured and cannot possibly secure the "consent of *all* concerned".

By disregarding these principles, the lower courts have in effect used the "consent" provision of DR5-105 (C) to emasculate the main thrust of DR5-105 and the fundamental ethical principles it embodies. While the adverse effects of that emasculation far transcend the insurance context, their destructive effect in the insurance context is itself cause for general concern, as the present case amply demonstrates.

It is inherently impossible for one in Risjord's position to exercise the independence of judgment which an attorney's duty of undivided loyalty demands, Risjord's tactical and strategic choices in prosecuting the claims of the Risjord Plaintiffs (*e.g.,* in deciding wheth-

er and if so how aggressively to pursue his "intentional tort" theory) cannot be divorced from his awareness that his actions may impinge on the success or failure of his long-standing client, Home, in avoiding liability under the Firestone policy.

Even if Risjord's "intentional tort" theory were not consciously conceived with Home's interests in mind, in determining whether and to what extent to pursue it, his independence of judgment must inevitably be clouded by his awareness that such a theory is helpful (and its abandonment harmful) to his client Home. In the face of that awareness, Risjord cannot assess the tactical and strategic "pros" and "cons" of such a theory (*e.g.*, whether it may appear so far-fetched as to weaken the balance of the Risjord Plaintiffs' cases in the eyes of the jury) with the degree of independence which his duty of undivided loyalty demands. *A fortiori,* how can it be said that Risjord's conduct has not created an "appearance of impropriety" which can be dispelled only by his disqualification?

Nor are the concerns voiced by Firestone novel or unique. The courts have taken note of the danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit. See, *e.g., Tomerlin v. Canadian Indemnity Co.*, 61 Cal.2d 638, 647, 39 Cal.Rptr. 731, 394 P.2d 571 (1964) ("in cases involving multiple claims against the insured, some of which fall within the policy coverage and some of which do not, the insurer may be subject to substantial temptation to shape its defense so as to place the risk of loss entirely upon the insured". (footnote omitted). See also *Comment: The Insurer's Duty to Defend Under a Liability Insurance Policy,* 114 Univ.Pa.L. Rev. 734, 736 (1966), noting "the

insurer's natural tendency to confine the third party's action to claims outside of coverage as soon as possible, even at the expense of the insured's interests."

While *Tomerlin* involved an insurer-linked attorney engaged to represent an insured defendant, the danger is no less real when such counsel purport to represent a plaintiff. Indeed, the risks are compounded, due to the greater control exercised by plaintiff's counsel over the theory of the action, the fact that *two* interests (*i.e.*, the plaintiff and the defendant-insured) are placed in jeopardy, and the increased difficulty of assessing the attorney's motives in a context where breaches of loyalty are less likely to be flagrantly apparent. Indeed, the impossibility of detecting and policing the possible impact of the insurer's interests on subtle nuances of tactics and strategy renders the danger particularly serious in the plaintiff-attorney context. *Cf. Holloway v. Arkansas,* 435 U.S. 475, 491 (1978) (". . . to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.").

Moreover, in light of Home's fiduciary obligations to Firestone and Firestone's vital stake in the actual and potential consequences of the conflict, a "consent" approach which ignores Firestone's interests is not viable. At the very least, Firestone's consent or permission should be required as a precondition to any consent by Home, having in mind the risk that Home, notwithstanding its fiduciary duty not to take or permit any action respecting the conflict or its resolution which is or may appear to be detrimental to Firestone's interests, might choose to gamble on the conflict in the hope of benefiting at Firestone's expense. Indeed, Home's very willingness to consent to Risjord's dual

> fessional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
>
> (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

In *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978), the Third Circuit Court of Appeals interpreted an identical provision of the Code of Professional Responsibility of the District of New Jersey and applied that provision to a case that is indistinguishable from the facts of this case. That court stated:

> The rule [DR 5-105] does not define the nature or extent of the adverse effect contemplated on the attorney's exercise of independent judgment. However, DR 5-105(C) makes clear that situations entailing the likelihood of an adverse effect include circumstances in which such an effect may be minor permitting the performance of adequate services in spite of it. In those cases the multiple representation may take place if the attorney believes in good faith that he can adequately represent both clients and if the consent of the clients is obtained.

> We think, however, that it is likely that some "adverse effect" on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter. *See Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386-1387 (2d Cir. 1976); *Grievance Committee of the Bar of Hartford County v. Rottner*, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964); Advisory Committee on Professional Ethics of the Supreme Court of New Jersey, *Opinion* No. 282, 97 N.J.L.J. 362 (1974), and *Opinion* No. 301, 98 N.J.L.J. 209 (1975). For example, a possible effect on the quality of the attorney's services on behalf of the client being sued may be a diminution in the vigor of his representation of the client in the other matter. *See Cinema 5, Ltd. v. Cinerama, Inc., supra* at 1387. A serious effect on the attorney-client relationship may follow if the client discovers from a source other than the attorney that he is being sued in a different matter by the attorney. The fact that a deleterious result cannot be identified subsequently as having actually occurred does not refute the existence of a likelihood of its occurrence, depending upon the facts and circumstances, at the time the decision was made to represent the client without having obtained his consent.

After consideration of the briefs submitted by Firestone and by Mr. Risjord, and after consideration of the facts to which they have stipulated, this Court, like the court in *IBM v. Levin, supra,* "think[s] . . . that it is likely that some 'adverse effect' on an attorney's exercise of his independent judgment on behalf of a client may result from the adversary posture toward

that client in another legal matter." *IBM v. Levin, supra* at 280. Accordingly, Mr. Risjord will, hereinafter, be directed to either comply with the consent requirement of DR 5-105(C) or terminate his representation of either the plaintiffs in the cases in which Firestone is a defendant or his representation of Home Insurance Company.

This Court is, however, of the opinion that this ruling on the disqualification of Mr. Risjord because of a conflict of interests involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this ruling may materially advance the ultimate termination of this litigation. This Court will, therefore, pursuant to 28 U.S.C. § 1292 (1976), certify this ruling for immediate appeal.

In addition, Firestone also argues that Mr. Risjord should be disqualified from further participation in this case because of an alleged violation of Local Rule 24. The allegations made in this argument raise questions of fact that will require an evidentiary hearing. A violation of Local Rule 24 would permit the imposition of some sanctions against Mr. Risjord, but the sanction of disqualification from further representation in this case would not be justified. Thus, since the relief requested by Firestone will not be granted even if the allegations of a violation of Local Rule 24 are true, a hearing on the questions of fact that are raised by Firestone's allegations will be deferred until a later date.

. . . .

[The omitted portions of the Second Pretrial Order relate to matters other than the order which is the subject of this Petition.]

IX.

The pending motions discussed above and those argued during the pretrial conference will be ruled without further discussion. It is, thus,

. . .

13) ORDERED that, on or before August 31, 1979, Mr. Risjord certify to this Court, by way of affidavit, that he has either met the consent requirement of DR 5-105 or terminated his representation of either Home Insurance Company or the plaintiffs in any suit against Firestone; and it is

14) ORDERED that this Court's ruling on the question of Mr. Risjord's disqualification because of a conflict of interests be, and hereby is, certified for immediate appeal pursuant to 28 U.S.C. § 1292 (1976).

/s/ W. R. Collinson
District Judge

Dated: August 16, 1979.

APPENDIX B.

United States Court of Appeals for the Eighth Circuit.

In re: Multi-Piece Rim Products Liability Litigation. Firestone Tire & Rubber Co., Appellant, v. John C. Risjord, Appellee. No. 79-1781.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 28, 1979.

Filed: January 7, 1980.

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and McMILLIAN, Circuit Judges, sitting en banc.

LAY, Circuit Judge.

Personal injury claimants brought suit against the Firestone Rubber Co. and Firestone moved thereafter that claimant's counsel, John C. Risjord, and his law firm be disqualified from representing them because of an alleged conflict of interest with Firestone's insurer. The district court, the Hon. William R. Collinson presiding, ordered counsel Risjord to comply with the consent requirement of Disciplinary Rule 5-105 of the Code of Professional Responsibility of the Missouri Supreme Court or terminate his representation of either plaintiffs or the insurer.[1] Risjord thereafter complied with DR5-105(C) which required that Risjord receive consent

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[1]DR5-105(C) provides:

> In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

from the insurance carriers or terminate his representation in the suit. The district court ruled that Risjord had complied with his order and that Risjord should not be disqualified from the litigation. The district court further certified his ruling on the disqualification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Rather than obtain permission to appeal from this court, as required under section 1292(b), Firestone simply filed a notice of appeal. Risjord challenges the order as not being appealable since it is not a final order. The law in this circuit has been that an order denying a motion for disqualification of counsel is final under the collateral order doctrine recognized by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 606-07 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); *Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979).

Recently, the Sixth Circuit overruled an earlier decision and held an order denying a motion for disqualification of counsel would no longer be appealable under the collateral order doctrine. *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979). The Sixth Circuit stated:

> Motions to disqualify an opponent's counsel can easily be simply "disguised harrassment [sic]".
>
> . . . .
>
> A rule allowing interlocutory appeals here would provide litigants with yet another device by which to delay final determination on the merits, and would lead the court to divert its attention from the central issues in the case.

Id. at 295, (footnote omitted) (quoting in part *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1027 (D.C. Cir. 1976)).

We have reconsidered *Weber* and *Dean Foods* and now agree with the position of the District of Columbia, Sixth and Ninth Circuits; it is the opinion of this court that *Weber* and *Dean Foods* should be and hereby are overruled.[2] *See generally,* Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts,* 45 U. Chicago L. Rev. 450 (1978).

In so holding we recognize there exists a fundamental distinction between a denial of a motion of disqualification of counsel and a grant of a motion for disqualification. In the latter case of disqualification we will still continue to apply the collateral order doctrine and recognize the order as appealable. We also concur with the Sixth Circuit's opinion, which allows for immediate review in the exceptional case where irreparable harm could occur by denial of an interlocutory appeal. The Sixth Circuit observed:

> We believe our position denying interlocutory appeal of orders refusing to disqualify counsel to be fully consonant with the Supreme Court's holding in *Cohen*. Although "collateral" to the main proceeding, an order denying a motion to disqualify does not, in most cases, implicate any claim of right that will be irreparably lost on appeal from final judgment. In the exceptional case, where irreparable harm would indeed result, the movant may petition this court for a writ of mandamus under 28 U.S.C. § 1651 (1970),

[2]This opinion has been circulated to the court en banc, and all active judges concur.

> the All Writs Act. This approach will afford the court the flexibility necessary to prevent serious injustice while advising litigants of the court's extreme reluctance to depart from the final judgment rule.

Melamed v. ITT Continental Baking Co., 592 F.2d at 296 (quoting *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1027-28 (D.C. Cir. 1976)).

In fairness to the appellant in the instant case, we hold the overruling of *Weber* and *Dean Foods* to be prospective only. Thus, we permit the instant appeal. Nevertheless, we have carefully reviewed the pleadings, and briefs, and have concluded that the district court did not abuse its discretion in refusing to disqualify counsel. Accordingly, the motion to dismiss is denied, the district court's denial of the motion to disqualify is affirmed, and the case is remanded to the district court for further proceedings.

IT IS SO ORDERED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Judgment.

United States Court of Appeals for the Eighth Circuit.

In Re: Multi-Piece Rim Products Liability Litigation Firestone Tire & Rubber Company, Appellant, vs. John C. Risjord, Appellee. No. 79-1781.

September Term, 1979.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be considered on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties without oral argument.

On consideration whereof, it is now here ordered and adjudged by this Court, that appellee's motion to dismiss is denied.

And it is further ordered that the said District Court's denial of the motion to disqualify is affirmed.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the opinion of this Court.

January 7, 1980

Cost taxed in favor of appellee:

Cost of printing 10 copies of brief:	$553.64
Total costs of appellee for recovery from appellant in the U.S. District Court:	$553.64

[Entered January 7, 1980]

Order entered in accordance with opinion:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.